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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1271

LEE MANSELL GILSTRAP and MARCUS RANDOLPH MARTIN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT B. THOMPSON
P. O. Box 679
Gainesville, Georgia 30501
Attorney for Petitioners

R. L. MIDDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in ..... F.2d ..... A copy of the official opinion of this case is appended hereto. (R 564).

(b)

GROUNDS OF JURISDICTION

The opinion sought to be reviewed, entitled Lee Mansell Gilstrap and Marcus Randolph Martin v. United States of America, No. 24487, is dated January 31, 1968, petition for rehearing denied March 1, 1968. On March 8, 1968, the Court below entered an Order staying its mandate for a period of 30 days from March 1, 1968, to and including March 31, 1968, pending the filing and ultimate disposition of its petition for writ of certiorari.

The jurisdiction of this Court is invoked under 28 USC 1254 (1), and under and by virtue of Title 18, USC 3772, within the time provided for in Rule XI and Rule 22 (2) of the Rules of Practice and Procedure of the Supreme Court of the United States.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided important questions of federal law of gravity and importance in the administration of criminal justice which have not been but should be settled by this Court. That Court had held constitutional, under timely and proper attack, a statute of the United States, 18 USC 1952, which patently offends constitutional standards and has misconstrued and misapplied a decision of this Court respecting the function and predicates of the Official Records Act, 28 USC 1732, and in its ruling has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision.

Additionally, the ruling of the Fifth Circuit in this case, relating to the admissibility of evidence under the Official Records Act, 28 USC 1732(a), is in direct conflict with the ruling of the Sixth Circuit in *NLRB* v. *Sharples Chemicals*, 209 F.2d 645, 653-654, and prior rulings of the Fifth Circuit.

(c)

QUESTIONS PRESENTED

1.

Does not the federal "Aid of Racketeering Statute", 18 USC 1952, violate federal statutory and constitutional standards in the following particulars?

(a) Section 18 USC 1952 is unconstitutionally vague and indefinite, in that it is not sufficiently concise and clear so as to define a criminal offense with adequate clarity to fix a standard or course of conduct which is prohibited thereby, all in violation of the due process provisions of the Fifth Amendment to the Constitution of the United States;

(b) Section 18 USC 1952 is unconstitutional for the reason that its provisions are in excess of the power granted Congress under Article I, Section 8, of the Constitution of the United States;

(c) Section 18 USC 1952 is unconstitutional for the reason that it constitutes an encroachment upon powers reserved by the Tenth Amendment of the Constitution of the United States to the States and is violative of that Amendment; and

(d) Said statute is unconstitutional for the further reason that it infringes upon the right of citizens of the United States in the free exercise and enjoyment of the right to travel freely and to use the instrumentalities of interstate commerce in interstate travel.

2.

Does the "Official Records Act", 28 USC 1732, permit admission of records in evidence against a third party merely upon proof that they were seized by FBI agents

from a corporation and its agent, without further proof of authenticity, identification or predicate?

(d)

STATUTES INVOLVED

18 USC 1952. **Interstate and foreign travel or transportation in aid of racketeering enterprises**

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Added Pub.L.

87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498, amended Pub.L. 89-68, July 7, 1965, 79 Stat. 212.

28 USC 1732. **Record made in regular course of business; photographic copies**

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(e)

STATEMENT OF THE CASE

The two petitioners, Gilstrap and Martin, were two of four defendants named in a four count indictment, charging a conspiracy to violate and substantive violations of 18 USC 1952. A motion to dismiss the indictment was overruled, followed by a trial which resulted in a verdict of guilty. Sentences were imposed and the judgment was appealed to the United States Court of Appeals for the Fifth Circuit. Upon affirmance there, this petition for writ of certiorari has been timely filed.

The evidence disclosed that Gilstrap had been previously engaged in the gambling business in violation of the laws of the State of Georgia. (R 22-25). In January, 1965, Gilstrap, together with another defendant, caused telephone calls to be placed from a location in Georgia to a Mr. Sullivan in Las Vegas, Nevada, for the purpose of ordering certain gambling equipment. (R 33-36). On later dates, as a part of the transaction, other telephone calls were made to Las Vegas and to St. Louis, Missouri. (R 36-42). The purchase price of the equipment was forwarded from Atlanta to Las Vegas, Nevada, via Western Union money order. (R 44-45). The gambling equipment was shipped via truck freight from Las Vegas to Atlanta, Georgia. (R 7, 142, 148, 155, 160, 165). Thereafter it was transported from Atlanta, Georgia, to Augusta, Georgia, where it was used in a gambling establishment in violation of the laws of the State of Georgia. (R 167).

In April, 1965, FBI Agent Cornett executed two search warrants in Las Vegas, one at the residence of Sullivan and one at the place of business of Christy and Jones, Inc. At the Sullivan residence, he seized Government Exhibit 6 and at Christy and Jones, he seized Government Exhibit 7. Government Exhibit 6 consists of a folder reflecting a transaction alleged to be the order placed for the gambling equipment giving details of the transaction and showing telephone number of Christy and Jones. Government Exhibit 7 is some Roll-O-Dex file cards likewise reflecting this transaction. (R 199-204). Cornett testified that he had no knowledge as to by whom or when the records were made; whether the contents of the records were true or false; he made the determination as to what records he would seize and all he knew about the records, Government Exhibits 6 and 7, was that they were present at the places he searched in Las Vegas and that he seized them. (R 208). These records were admitted over timely

and strenuous objection that they were hearsay and that the evidence did not substantiate the predicates required by the Official Records Act, 28 USC 1732. (R 205, 420). In addition to the use of these records as evidence of the transaction, the records were used for the purpose of establishing the telephone number of Christy and Jones and to prove, by use of the telephone numbers shown thereon, the interrelationship of various telephone calls alleged to have been made among the various alleged conspirators.

REASONS FOR GRANTING THE WRIT

This Court has not heretofore ruled upon the constitutionality of 18 USC 1952, although serious constitutional questions are presented as to the validity of that statute as indicated by Question No. 1 enumerated above. The Fifth Circuit has in this case sustained the validity of the statute, as has the Seventh Circuit in *United States* v. *Zizzo,* (1964) 338 F.2d 577; the Eighth Circuit in *Bass* v. *United States,* (1963) 324 F.2d 168; and the Ninth Circuit in *Turf Center, Inc.* v. *United States,* (1963) 325 F.2d 793. While this Court in *United States* v. *Fabrizio,* 285 US 263, has had occasion to review a companion statute, 18 USC 1953, no issue involving the constitutionality of that statute was before the Court.

With reference to the "Official Records Act", 28 USC 1732, this Court in *Palmer* v. *Hoffman,* 318 US 109, held that business records, in order to be admitted under this statute, must be authenticated and the predicate required by the statute must be established. The Court below held admissible exhibits seized by an FBI agent from corporate and individual records without the requirement that any predicate as to their authenticity or trustworthiness be laid and without any identification of the same, save testimony of the agent that he had seized them at certain places in Las Vegas, Nevada.

QUESTION ONE RESTATED

Does not the federal "Aid of Racketeering Statute", 18 USC 1952, violate federal statutory and constitutional standards in the respects hereinbefore stated?

It is to be observed that under 18 USC 1952, certain conduct is made criminal, dependent upon subsequent events which may or may not be related to the original conduct and need not be related in any way, or pursuant to, such original conduct. The statute in question has neither time, geographical nor definitive conduct limitations.

The offense defined by the statute is completed only after one travels in commerce or utilizes facilities in commerce with the requisite intent and thereafter engages in unlawful activity. *It is not necessary that the subsequent activity be pursuant to the original intent.* Thus, if one travels to Georgia, for instance, intent upon engaging in unlawful prostitution, and thereafter engages in an unlawful gambling enterprise, it would appear that he has violated the statute. On the other hand, if he should travel to Georgia with the intent to engage in unlawful gambling activities and upon failing to make intended connections, returns to his state of origin and thereafter resumes or undertakes any unlawful activity described in the statute, he is subject to the penalties of the statute. This would also be true if he, once arriving in Georgia, went to a third state for unrelated purposes, but while there violated the gambling laws of that state. There are no limitations to such examples.

The vice of vagueness in criminal statutes is the treachery they conceal, either in determining what persons are included or what acts are prohibited. *United States* v. *Cardiff*, 344 US 174. A penal statute must be construed

strictly. Courts cannot introduce words of limitation into a penal statute, so as to make it specific when, as expressed, it is general only. *United States* v. *Reese*, 92 US 214. The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement. *Winters* v. *New York*, 333 US 507.

In order to be consistent with the constitutional requirement of due process, the terms of a statute enumerating a new penal offense should not forbid the performance of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, but must be specifically explicit to inform those who are subject to it what conduct on their part will render them subject to its penalties. *Lenzatta* v. *New Jersey*, 306 US 451.

Since the crime sought to be defined by the statute would not be complete until the person affected thereafter committed an unlawful act specified, once he traveled in commerce with the requisite intent, that is with the intent to do any of the specified acts—subparagraphs (1), (2) or (3) as further defined by (b)—, as the statute is drawn, for the remainder of his life he would be subject to prosecution within the period of limitations following his actual performance of the act initially intended or any other act specified by the statute.

At this point we might distinguish those statutes which have been held constitutional which involve interstate travel. In those instances, for example, interstate flight or interstate transportation of vehicles (Dyer Act), or women (Mann Act), the crime is complete once the interstate travel with the prohibited intent is accomplished. This is not true under the present statute, for in order for

the interstate nature of the transaction to become a crime, a subsequent violation of state law is a necessary element. Under the statute, as submitted above, the subsequent act could take place at any time and at any place and could be totally unrelated to the original intent or destination.

For the reasons urged, the statute lacks the specificity necessary to define a criminal offense and to accord due process of law.

In its recent opinion, *United States* v. *Guest*, 383 US 745, this Court held that a citizen of the United States has a basic constitutional right to travel from state to state. The statute under review is an unwarranted limitation upon and restriction of that right. This is especially so in view of the scope of the statute, as urged above. Once a person has become infected with the virus of the statute by traveling in interstate commerce, or by using the facilities of such commerce, he thereafter is restricted in his activities with respect to the acts and conduct specified in subparagraphs (1), (2) and (3), although such subsequent act may be unrelated to the initial travel or communication.

This statute constitutes a perversion of the power of Congress under the Commerce Clause of the Constitution, Article I, Section 8, Clause 3, and is an encroachment upon powers reserved by the Tenth Amendment to the various states. While, by statutory construction and otherwise, the Commerce Clause has been expanded beyond any concept the framers of the Constitution could have anticipated, this statute reached beyond the periphery of further extension. In its broad scope, the statute undertakes to usurp the function of the state to enforce its criminal laws. It assumes powers not delegated, but reserved to the states.

Because a violation occurs only subsequent to the use of interstate facilities, and then only if a state law is subsequently violated, it punishes not for a federal offense, but for a state offense. Because of the diverse laws of the various states, there is no uniformity in its application. This points up the excesses of the statute.

The vice is found, basically, but not limited to, the fact that the travel in or use of interstate facilities, even with the designated unlawful intent, is not a violation. A violation may be effected, retroactively, only when a state statute is subsequently violated. Under the terms of the statute, the interstate nature of the original conduct is in reality only incidental. The intent, substance and effect of the statute is to punish violations of state law. This conclusion is too clear to be disregarded. It is the same conclusion that was reached by the Supreme Court in *United States* v. *Constantine*, 266 US 287.

QUESTION TWO RESTATED

Does the "Official Records Act", 28 USC 1732, permit admission of records in evidence against a third party merely upon proof that they were seized by FBI Agents from a corporation and its agent, without further proof of authenticity, identification or predicate?

We do not find that this Court has had occasion to specifically rule upon questions arising under the Official Records Act except in *Palmer* v. *Hoffman*, (1943) 318 US 109.

In *Hoffman*, this Court carefully reviewed and dealt with this statute, concluding that the admissibility of records under this statute depends upon the requirements thereof being first met, stating that the basis of the rule is the probability of trustworthiness of records "because

they were routine reflections of the day to day operations of a business".

In context, the evidence complained of here consists of records seized from a business enterprise and from an individual on the basis of a search warrant executed by an FBI agent.

Petitioners are total and complete strangers to both the business enterprise and the individual. There is no evidence that records were kept in the regular course of business, that it was the regular course of business to make such records at the time of the occurrence of an act or transaction or that such records were made within a reasonable time after the transaction. Indeed, the records were not identified by any person other than the FBI agent who seized them.

In *Hoffman*, this Court pointed out that the very crux of the preliminary proof for admission under the Official Records Act was establishment that records sought to be introduced were kept in the regular course of business and that they be otherwise properly identified and authenticated as required by the Act. Admissibility of records under this statute depends upon the requirements thereof being first met and the predicates provided therein being properly established.

The ruling of the Court below is in direct conflict and offends the ruling in *Hoffman*. Furthermore, it is without precedent and is inconsistent with all decisional authority.

It has been held that the true test of admissibility of memoranda covered under the business entry rule is the regularity of the business practice of making such a record. *Smith* v. *Bear*, 2 Cir., 237 F.2d 79, 89, citing *Hoffman*.

The decision below constitutes precedent for the admission of evidence totally inconsistent with the following authorities.[1] It constitutes authority for the proposition that a document may be admitted in evidence with no more proof of its authenticity than that it appears to be a business record. In other words, that documents which appear on their face to be business records are "self-identifying", and need not be further identified, despite the ruling of this Court in *Palmer* v. *Hoffman,* supra, and the ruling of substantially all of the United States Courts of Appeal.

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for writ of certiorari should be granted and that this Court should determine that the Court below erroneously upheld the constitutionality of 18 USC 1952 under the contentions urged and that it erroneously construed and applied 28 USC 1732(a) in the light of the decision of this Court in *Palmer* v. *Hoffman,* supra, and the existing decisional authorities.

Respectfully submitted,

ROBERT B. THOMPSON

1. *United States* v. *Fienberg,* 2 Cir., 144 F.2d 592, 596; *Wolcher* v. *United States,* 9 Cir., 200 F.2d 493, 498; *Bruce* v. *McClure,* 5 Cir., 220 F.2d 330, 335; *Standard Oil Co. of Calif.* v. *Moore,* 9 Cir., 251 F.2d 188, 212, 216; *Niederkrome* v. *C. I. R.,* 9 Cir., 266 F.2d 238, 241; *Teague* v. *United States,* 9 Cir., 268 F.2d 925; *Missouri Pacific R. R. Co.* v. *Austin,* 5 Cir., 292 F.2d 415, 421; *Bisno* v. *United States,* 9 Cir., 299 F.2d 711; *Hagans* v. *Ellerman & Bucknall,* 3 Cir., 318 F.2d 583; *Carroll* v. *United States,* 9 Cir., 326 F.2d 72, 79; *Taylor* v. *B. Heller & Co.,* 6 Cir., 364 F.2d 608, 613.